IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5796

FRANK PETILLO,

Petitioner,

— vs —

STATE OF NEW JERSEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether a defendant in a state criminal action on a motion to suppress evidence may introduce extrinsic evidence to controvert the veracity of material statements of fact set forth in the affidavit utilized in the *ex parte* application through which the search warrant was issued to seize the evidence obtained?

2. Assuming a defendant may introduce such evidence, was the evidence introduced at the motion to suppress *sub judice* such that the trial court should properly have deleted the controverted statements before considering the adequacy of the affidavit to support the issuance of a search warrant?

3. Whether the Supreme Court of New Jersey erred in holding that the affidavit *sub judice* was sufficient to constitute probable cause for the issuance of a search warrant even if the controverted statements as to the telephonic bets made by the officer were deleted from the *ex parte* affidavit?

REASONS FOR DENYING THIS WRIT

I

THE AFFIDAVIT *SUB JUDICE* ALLEGED SUFFICIENT FACTS, EXCLUSIVE OF THOSE CONTROVERTED, TO SUPPORT THE ISSUANCE OF THE SEARCH WARRANT.

The Supreme Court of New Jersey held that ". . . even if the references to such telephone calls were eliminated from Gauthier's affidavit, . . . probable cause existed for the issuance of the search warrant." *State v. Petillo*, 61 *N.J.* 165, 173, 293 *A.* 2*d* 649, 653 (Supreme Ct. 1972). Assuming the affidavit were so considered, it would have revealed that: (1) the affiant had received information from a reliable informant whose information had proven reliable in the past; (2) the informant specified that a particular crime was being committed by a particular individual at a particular address using a particular telephone; (3) the informant gave the underlying basis of his information i.e., he had placed numerous bets in the past, with the individual; (4) the affiant's

surveillance confirmed the information that the premises in question was a one family dwelling at 326 Bloomfield Avenue; (5) the affiant's surveillances revealed that the same individual would enter the premises each day, during prime bookmaking hours, carrying a paper bag and often carrying a red trimmed newspaper. It is submitted that under the criteria set forth in *Aguilar v. Texas*, 378 *U.S.* 108 (1964), *Spinelli v. United States*, 393 *U.S.* 410 (1969), and *United States v. Harris*, 403 *U.S.* 573 (1971), the New Jersey Supreme Court properly affirmed the finding of the trial court that the affidavit, excluding the questioned allegations, set forth a substantial basis for the issuance of the instant search warrant. It is further submitted that a review by this Court of the facts set forth in the affidavit *sub judice* in order to determine the existence of probable cause is not a sufficient reason for the granting of *certiorari*. The decision below, in this regard, turned largely upon its own facts, and this Court's interpretation thereof, it is respectfully urged, would not add significantly to the large body of law in the area of search and seizure.

In view of the adequacy of the instant affidavit, it is further submitted that it is extremely unlikely that petitioner's argument with regard to the controverted statements in the affidavit would be reached if *certiorari* were granted.

II

THE TRUTH OF THE FACTUAL ASSERTIONS CONTAINED IN AN AFFIDAVIT SUBMITTED IN SUPPORT OF AN APPLICATION FOR SEARCH WARRANT MAY NOT BE CONTROVERTED ON A SUBSEQUENT MOTION TO SUPPRESS THE EVIDENCE SEIZED IN EXECUTION OF THE WARRANT.

It is respectfully submitted that the New Jersey Supreme Court correctly decided that the truth of the factual assertions contained in an affidavit submitted in support of an application for a search warrant may not be controverted on a subsequent motion to suppress

the incriminatory evidence seized in the execution of the warrant. In support of this position, the State of New Jersey will rely, for purposes of this brief, upon the well reasoned opinion of Justice Francis, below. *State v. Petillo, supra.*

III

ASSUMING THAT CIRCUMSTANCES MIGHT EXIST IN WHICH THE TRUTH OF FACTUAL ASSERTIONS CONTAINED IN AN AFFIDAVIT COULD BE CONTROVERTED AT A SUBSEQUENT MOTION TO SUPPRESS, SUCH CIRCUMSTANCES DID NOT EXIST IN THE CASE *SUB JUDICE.*

The State of New Jersey respectfully contends that the factual finding of both the trial court and the New Jersey Supreme Court, that Trooper Gauthier had not committed perjury in the affidavit in question, was adequately supported by the record. The only testimony produced by petitioner in support of his contention that the statements in the affidavit were false, was that of an individual who disclaimed knowledge of the mechanics of circumvention of ordinary telephone company procedures. It is manifest that the evidence brought forth by petitioner was not sufficient either to prove perjury or to shift the burden of proof to the State. The State submits, therefore, that even if the truthfulness of the allegations set forth in an affidavit for a search warrant could properly be challenged under certain circumstances, that the facts in the case *sub judice* would not have supported such a challenge.

CONCLUSION

For the reasons set forth herein, the Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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DATED: January 23, 1973